

26 September 2005

From: Deputy Assistant Judge Advocate General, Legal Assistance (Code 16)

Subj: LAPA 23-05 LANDLORD TENANT ISSUES IN VIEW OF HURRICANE KATRINA

PURPOSE: This memorandum provides guidance for legal assistance practitioners assisting clients (including servicemembers in PPV housing) with landlord tenant issues unique to a post disaster area. Specifically, this memorandum will discuss rental price gouging and other landlord-tenant issues.

INTRODUCTION: Hurricane Katrina made landfall on 29 August 2005 becoming one of the most destructive and expensive tropical cyclones ever to hit the United States. On 27 August 2005 Commander, Navy Region South and Commander, Navy Region Southeast ordered all naval personnel in New Orleans and Gulfport to evacuate. The hurricane's wind and storm surge caused major destruction in both Mississippi and Louisiana, damaging or destroying many rental units occupied by naval personnel.

DISCUSSION: Some unscrupulous landlords may try to take advantage of naval personnel by either unfairly adjusting the rent, trying to collect rent when an obligation to pay has ceased or by illegally evicting the personnel when they return.

1. Price Gouging. If a client has a lease creating a tenancy for a specified period, the landlord MAY NOT raise the rent for that property during the period of that tenancy (until that lease term expires). Once the term of that lease is over, the tenant and landlord may either renew the lease at a newly agreed upon rental amount or the lease converts to a tenancy at sufferance. For residential leases, a tenancy at sufferance is formed on a month-to-month basis and the landlord can raise the rent as long as the landlord is not subject to rent control and the landlord gives the tenant 30 days notice of the new rental amount. No areas affected by Katrina are subject to rent control, so the only issue we will be facing is whether a person's rent is increased fairly or is truly the result of price gouging.

During a state of emergency, when a landlord (or other merchant) unfairly raises the price of an apartment (or any other good or service) to take advantage of a disaster it is called price gouging. If, on the other hand, the landlord raises the rent to cover any increased costs the landlord may be subject to, this is not price gouging. A good example would be an apartment where some or all of the utilities are included in the rent. If the utilities go up in price, the landlord can fairly pass that cost along to the tenant upon renewal of the lease. However, even in this case, the landlord cannot pass this cost on to the tenant in terms of increased rent during the term of an existing lease, unless there is a clause in that lease permitting the landlord to do so, or unless the tenant consents to the increase.

In determining if a rental increase is fair, the facts surrounding each case will figure significantly in the decision. Because so many units were damaged, the remaining available units will be diminished. This may drive up the fair market value of the units in the affected areas, permitting legitimate increases. The rents charged for similar units in the immediate area will need to be analyzed, and there may end up being a fine line between fair increases and price gouging. Additionally, a landlord

SUBJECT:LANDLORD TENANT ISSUES IN VIEW OF HURRICANE KATRINA

cannot discriminate against the returning evacuees by charging higher rents to persons who have received compensation or other forms of aid from FEMA or other agencies, as that would clearly constitute price gouging.

In any instance where a servicemember believes he or she has been a victim of price gouging, that person must be advised that they should obtain whatever records, receipts, leases or other evidence they can collect to help prove their case.

Both states have laws that prohibit price gouging. In Louisiana, that statute is La. R.S. 29:732. This act provides for both civil and criminal penalties. The criminal penalties can include fines of up to \$5,000 or imprisonment of up to twenty-one (21) years, or both. (La. R.S. 14:329.7.) The statute also allows the plaintiff to sue for attorney's fees and costs, so legal assistance practitioners should not be hesitant to ultimately refer these cases to civilian attorneys in accordance with normal referral policies if the local Attorney General's offices cannot resolve the claims. Remember, the servicemembers should be encouraged to collect all leases, correspondence, records and receipts so that their cases will be easier proved.

In Mississippi, Miss. Code 75-24-25 places restrictions on prices charged for goods during a state of emergency. Mississippi law also provides for both civil and criminal penalties. Criminally, the punishments can include fines up to \$5,000 and imprisonment of up to five (5) years, or both, (Miss. Code 75-24-20). Civil fines can be assessed up to \$10,000 per violation (Miss. Code 75-24-19). Since the law also allows the plaintiff to recover costs and attorney's fees in a successful action, appropriate referral to civilian attorneys, if necessary, should be done here as well. Again, collection of the relevant documents by the servicemembers will aid their cases.

In both states, if you suspect that a client is a victim of price gouging, you should have the client contact the state's Attorney General's office as a first step. Frequently, that office is able to resolve the problem. In Louisiana, the Attorney General's phone number is (800) 351-4889. The Louisiana Attorney General also provides additional information and accepts complaints via their website at <http://ag.state.la.us>. In Mississippi, the Attorney General's phone numbers are 1-800-281-4418 (toll free in Mississippi only) and 601-359-4230. Additional information can also be found on the Mississippi Attorney General's website at <http://www.agjimhood.com/divisions/consumer/how.php>. If the individual claims cannot be resolved at this level, retention by the servicemember of civilian counsel would most likely be the next step.

2. Landlord Tenant Issues.

a. Obligation to pay rent if the premises are destroyed. Under the common-law rule, if structures on leased premises were destroyed by fire or other act of God during the lease term and the lease contained no covenant on the subject, neither the landlord nor the tenant was obligated to rebuild, but the tenant was obligated to continue paying rent until the lease term expired. The common-law view changed as society became less agrarian and the value and importance of the homes increased. Today, the law for both Louisiana (La. C.C. 2714) and Mississippi (Miss. Code 89-7-3) relieves the tenant of the responsibility to pay rent if the leased premises are destroyed by an act of God. In Louisiana, if the property has been partially destroyed, and its use has

SUBJECT:LANDLORD TENANT ISSUES IN VIEW OF HURRICANE KATRINA

been substantially impaired, La. Civ Code art 2715 allows the tenant to terminate the lease. Since the law in this area is well settled, it is anticipated that such circumstances will give rise to little litigation.

b. Obligation to pay rent if the premises are damaged. The area where there will likely be significant activity is the situation where the property is damaged rather than destroyed. In these situations, individual factual situations will be relevant in addition to the laws of each state. In Louisiana, La. C.C. 2693 specifically provides that if a rental property is damaged, it is possible for a tenant to obtain a reduction or abatement of the rent or a dissolution of the lease depending on all of the circumstances. The statute however does not provide a method or procedure to be followed to determine the proper reduction amount. If a rental property becomes unfit for its intended use, the tenant may have the right to terminate the lease, even if the disabling condition was not the fault or within the control of the landlord. In one such case, a Louisiana court held that: "A lessor shall secure to the lessee the possession, use and enjoyment of the thing leased, against everything but the fault of the latter; and any loss of the thing, or deprivation of its use or enjoyment by accidents or fortuitous events, shall be borne by the lessor and not by the lessee." *Chargeois v. Fiero* 15 La. App. 290, 1930 La. App. LEXIS 623 (La. Ct. App., June 30, 1930, Decided). Louisiana law also recognizes: "If without the fault of the lessor, the thing ceases to be fit for the purposes for which it was leased, or if the use be much impeded, as if a neighbor, by raising his walls shall intercept the light of a house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity. La. Civ. Code art. 2669. So too, in regard to repairs; the whole rent is to be remitted if the repairs have been of such a nature as to oblige the tenant to leave the house, or the room, or to take another house, while that which he had leased was repairing." *Coleman v. Haight*, 14 La. Ann. 564, 1859 La. LEXIS 314 (La., June, 1859, Decided); and *Chryssoverges v. General Cigar Co.* 163 La. 364, 1927 La. LEXIS 1633 (La., February 28, 1927, Decided) However, since the ability to have a reduction will be case specific, if the landlord and tenant cannot come to an immediate agreement, it is likely that such cases will require mediation by the appropriate Attorney General's office or resolution through civil litigation.

In Mississippi, the Landlord Tenant Act does not explicitly authorize a tenant to withhold rent. However, if the damage renders the property temporarily uninhabitable, a tenant has two choices:

(1) Deliver written notice to the landlord specifically enumerating the conditions that make the home uninhabitable and stating that the lease will terminate if the landlord does not make the leased premises habitable within 30 days. If the landlord does not make the repairs, the lease terminates. If the landlord does make the repairs, the lease remains in effect, but the tenant probably does not get a reduction in rent. (Miss. Code 89-8-23 and Miss. Code 89-8-13).

(2) Offset the rent due to the landlord by the damages owed to the tenant. One of the remedies available to a tenant for uninhabitability is damages equal to the amount by which the value of the housing is reduced. Miss. Code 89-8-13(2) provides in part that "If there is a material noncompliance by the landlord ...the tenant may ... resort to any other remedy at law or in equity..." Thus, the right to damages may effectively offset a tenant's rental obligation.

SUBJECT:LANDLORD TENANT ISSUES IN VIEW OF HURRICANE KATRINA

In both states, the law allows the tenant to make minor “necessary” repairs if the landlord does not and deduct the amount of those repairs from the rental payments. In Louisiana, the tenant must prove the repairs were necessary, the landlord failed to repair them in a timely fashion and the price paid for the repairs was reasonable. (La. C.C. 2694). In Mississippi, the tenant can make reimbursable repairs and deduct the costs thereof from the rent if the tenant is not in breach, is current in his own rental payments, has not used this remedy within the last 6 months and the costs do not exceed the amount of one month’s rent. (Miss. Code 89-8-15).

c. Obligation to pay rent while evacuated. Neither state addresses this issue directly, however it is possible that landlords may waive the rent during the period of mandatory evacuation (some landlords have already done so). In any area where such evacuation continues for an extended period, it is possible that the damages sustained there would be so extensive that the properties would be significantly damaged or destroyed. The tenant would be able to make a plausible argument that the damage was thus so severe that the rationale used in paragraph (b) above would justify the offset of the rental payments.

An alternate situation will arise when the evacuation period has ceased, but the servicemember does not return immediately due to a reassignment by the Navy to another area for duty. Louisiana has enacted legislation that permits military members to terminate leases early under a number of different circumstances, including instances when: a) the member has received temporary orders in excess of three months duration to depart 35 miles or more from the location of the dwelling unit; and b) the member is ordered to reside in government-supplied quarters. La. Revised Statutes § 9:3261. Such early terminations require the military tenant to pay 1 month's rent if the tenant has been in the property for less than 6 months. The fee is ½ month's rent for tenants that have resided in the property for longer than 6 months. Additionally, it may be possible to utilize the order to another duty station in connection with the military termination rights afforded to lessees to terminate a lease and end an obligation to pay the rent. However, if the servicemember wants to remain in that property upon return (assuming the reassignment is truly temporary), he or she may have to continue to pay the rent if the landlord so insists.

d. Public-Private Venture (PPV) housing. PPV housing is a relatively new initiative where the Navy leases land to a private company for the purposes of building residences and other amenities for Navy personnel to enjoy. Once those residences are complete, NAVFAC works with a private management company to create a standard form lease that is delivered to military personnel who wish to live in the PPV residences. The lease between the PPV and the military member is a private business transaction - the Navy maintains no oversight of the lease, nor does the Navy become involved in the interactions between the military member and the PPV.

The payment for PPV housing is fairly straightforward. Housing units are assigned based on rank. Each gradation of rank (i.e., E1-E3, E4-E6, etc.) entitles the member to a more spacious living unit. The rent that is charged to military members to live in PPV housing is their monthly BAH. Essentially, an increase in rank/rate leads to an increase in rent (as a higher rank/rate means a higher BAH, but a nicer apartment). The payments delivered each month to the PPV are generally delivered by allotment created by the military member.

SUBJECT:LANDLORD TENANT ISSUES IN VIEW OF HURRICANE KATRINA

Some of the PPV units in the Gulf Coast region sustained damage from Hurricane Katrina. From the standpoint of client advice, servicemembers in PPV Housing are no different from those renting on the economy for landlord/tenant issues. The leases between the military members and the private companies are private documents that do not incur an obligation on behalf of the Navy. Servicemembers in PPV Housing are entitled to legal assistance with their landlord/tenant issues and the guidance detailed in paragraphs (b) and (c) applies.

e. Eviction. Tenants are protected from a landlord simply removing them from their homes by the obligations placed upon landlords to follow set procedures for eviction. If the proper procedures are not strictly followed, a tenant is going to be able to collect damages for wrongful removal. Both states require notices to be given to the tenant, establish mandatory time limits for responses and provide the tenants with the opportunity to contest the claim that they are in default. In Louisiana, the controlling law is La. C.C.P. 4701-4735. In Mississippi, the relevant code sections are Miss. Code 89-7-23 through 89-7-47.

f. Constructive Eviction. There may be instances where our servicemembers return home to find that the landlord has removed all of their possessions out of their homes, either placing them outside exposed to the elements, or perhaps into another facility or building, but with the intent to permanently remove the tenant from the premises. This action is illegal. Practically, though, this is another “gray” area where the tenant will have to spend a significant amount of time in obtaining satisfaction and compensation from the landlord. In these instances, the proper eviction procedures will not have been followed. Most likely the landlord will also not be seeking the rental payments from the tenant, simply telling the tenant that the lease is terminated. If the tenancy was week-to-week or month-to-month, the termination may actually be genuine. If the lease was for a fixed period, however, and that time frame has not yet expired, the lease truly has not terminated. The state laws give the tenants the right to terminate leases early for destruction/uninhabitability issues, but not the landlords. The difficulties that tenants may face in these situations include lack of housing, having to locate new housing in areas where there is likely limited availability, the potential loss of their personal property that has been discarded outside or potential payment of storage charges for which they did not contract. The landlords will be liable to the tenants in these circumstances, but it will often take litigation to determine and collect damages.

There may also be situations where the landlord has removed the personal property, but under the guise of having to do so in order to obtain repair the premises. The individual circumstances will have to be analyzed to determine if the removal was truly necessary, or if the repairs could have been made simply by moving the property within the premises. If the property was disposed of in a manner that it was exposed to the elements and therefore ruined, the landlord may try to avoid liability by alleging that it was in that condition due to the damage the home received from the hurricane and his actions caused no further damage. The damage to the immediate area in general, and the rental property in particular will be the main determining factors in whether the storm ruined the property or not. More likely, the property will have sustained some damage in the storm if the house is that badly damaged, but it may not have been ruined, and the exposure to the elements will certainly have worsened

SUBJECT:LANDLORD TENANT ISSUES IN VIEW OF HURRICANE KATRINA

it. The amount of recovery by a tenant in such circumstance will be an issue ripe for negotiation or will have to be determined by the trier of fact if litigation ensues.

g. Security Deposits. The law in both states requires the landlord to return a tenant's security deposit within 30 (Louisiana) or 45 (Mississippi) days after termination of the lease. As is typical, the only reasons the landlord can withhold monies from that deposit is if there is damage, beyond normal wear and tear, caused by the tenant. An itemized list of the damages and the amounts retained, plus actual refund of the remaining security deposit, must be delivered to the tenant by the expiration of the 30 or 45 day time limit. Landlords in these areas will have an extremely difficult time proving that damage was done by the tenant and not the hurricane. A tenant should then be able to expect full reimbursement of security deposit. In Louisiana, La. R.S. 9:3251-3254 controls, and the penalty to the landlord for wrongful retention of the security deposit is the actual damages sustained by the tenant (or \$200, whichever is greater), plus attorney's fees and court costs. In Mississippi, Miss. Code 89-8-21 provides that the landlord is subject to actual damages plus \$200. It is important to advise the tenant that he should ensure that the landlord has a current forwarding address to which he can send the refund.

Both states have very good information available on state websites. In Louisiana, a comprehensive summary of the state landlord-tenant law is available at www.ag.state.la.us. Click on the Programs and Services tab, then on Consumers, then Publications, and finally on A Louisiana Guide to Landlord and Tenant Laws. In Mississippi, FAQs can be found at www.msbar.org. Under the heading Hurricane Katrina Disaster Training Manual for Mississippi Lawyers, click on Part I. The landlord tenant section begins on page 32.

3. Thanks go to CAPT(sel) Nancy Gawryszewski of NRCIVLAWSUPACT 108 who researched and drafted this LAPA and to Chris Rydelek, Head of the Legal Assistance Branch for Headquarters Marine Corps and LT Brian E. Weinthal, Assistance Force Judge Advocate, Commander, Navy Installations Command (CNI) for providing substantive input on this LAPA. If you have questions, feedback or input on the issues contained in the LAPA, please contact us in Code 16. Additional information on Hurricane Katrina related legal assistance issues may be found under the Legal Assistance heading at www.navy.mil/TFNF/html.

Very respectfully,

J. A. FISCHER